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Robert Schuman Centre for Advanced Studies
RELIGIOWEST

Defining Religion in American Law:
Psychic Sophie and the Rise of the Nones

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Abstract

The most important recent development in American religion is the dramatic increase in the number of people who claim no religious affiliation — the rise of the Nones. In this Working Paper, I discuss the social factors that explain the rise of the Nones--demography, politics, family, technology, a distrust of institutions generally--and explain what this development might mean for the definition of religion in American law. I focus on a recent federal appeals court case involving a self-styled spiritual adviser, “Psychic Sophie,” who claimed that following her “inner flow” constituted a religion meriting constitutional and statutory protection. I argue that the case is a close one. Protecting Nones as a religion would promote the important goals of state religious neutrality and personal autonomy. On the other hand, religion has always been understood in terms of community. Indeed, as Tocqueville saw, it is precisely religion’s communal aspect that makes it so important to liberal democracy. Granting Nones the status of a religion would fail to capture this important social benefit.

Keywords

Law and Religion, Sociology of Religion, Religious Liberty, Nones

Introduction*

The most important recent development in American religion is the dramatic increase in the number of people who claim no religious affiliation at all—the rise of the “Nones.” A 2012 Pew Research Survey found that roughly 20% of Americans today do not identify with a religion. For Americans under the age of 30, the percentage was even higher, around 30%.¹ By contrast, in the 1950s, only three percent of Americans said they had no religious identity.² According to Pew’s numbers, Nones now qualify as the third largest “religious” group in the country, behind Protestants and Catholics.³

To be sure, some observers dispute these numbers.⁴ The percentage of Nones may be smaller than the Pew Study indicates, perhaps 13 or 14%,⁵ even a little less.⁶ And church membership in America is higher than it has ever been;⁷ what seems to be happening is that people with marginal religious affiliations are drifting even further away.⁸ Whatever the exact numbers, the rise of the Nones is a “highly reliable” statistical finding.⁹ And the trend is upward. The number of American Nones began to climb suddenly in the 1990s and the increase shows no signs of stopping.¹⁰ According to Pew, the number of Nones has gone up five percent in just the last five years.¹¹ By any standard, an increase of that magnitude constitutes a dramatic change in a country’s religious culture.

One might think the rise of the Nones reflects a turning away from faith. Not so. Only a small percentage of Americans—around four percent—say they are atheists, and that percentage has not changed since pollsters starting asking the question some 60 years ago.¹² The large majority of Nones are neither atheists nor agnostics. About two-thirds believe in God or a “universal spirit.”¹³ More than 90% pray; almost 40% pray once a week or more.¹⁴ Sixty percent believe in life after death.¹⁵ And about one-third of Americans who say they have no religious identity nevertheless declare that religion is “very” or “somewhat important” in their lives.¹⁶

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¹ “‘Nones’ on the Rise,” Pew Research Religion and Public Life Project (2012), <http://www.pewforum.org/2012/10/09/nones-on-the-rise/> (hereafter *Pew Study*).

² MARK CHAVES, *AMERICAN RELIGION* 19 (2011).

³ *Pew Study*, *supra* note 1.

⁴ Chaeyoon Lim et al., *Secular and Liminal: Discovering Heterogeneity Among Religious Nones*, 49 J. SCIENTIFIC STUDY OF RELIGION 596, 596 (2010).

⁵ FRANK NEWPORT, *GOD IS ALIVE AND WELL* 12 (2012) (citing Gallup Surveys).

⁶ For example, surveys conducted by Baylor University in 2005 and 2007 found that 11% of Americans reported that they had “no religion.” RODNEY STARK, *WHAT AMERICANS REALLY BELIEVE* 141 (2008).

⁷ RODNEY STARK, *AMERICA’S BLESSINGS* 6 (2012).

⁸ *See* CHAVES, *supra* note 2, at 19-20.

⁹ NEWPORT, *supra* note 5, at 13.

¹⁰ ROBERT D. PUTNAM & DAVID E. CAMPBELL, *AMERICAN GRACE* 122 (2010).

¹¹ *Pew Study*, *supra* note 1.

¹² STARK, *supra* note 6, at 117. The Pew Study suggests a small uptick in this number. *Pew Study*, *supra* note 1.

¹³ *Pew Study*, *supra* note 1.

¹⁴ STARK, *supra* note 7, at 28. The Pew Study suggests the percentages are somewhat less.

¹⁵ CHAVES, *supra* note 2, at 38.

¹⁶ *Pew Study*, *supra* note 1.

Keeping to one side the small number of atheists and agnostics, then, Nones do not reject belief. Rather, they reject institutional religion. A better term for them might be religious “Independents,”¹⁷ or the familiar “spiritual but not religious.” The late Robert Bellah famously referred to them as “Sheilaists,” after a woman called “Sheila” who told researchers that she didn’t attend church, but simply followed her “own little voice.”¹⁸ Whatever term one uses, Nones come in many varieties, and it is difficult to come up with a categorical description. But common themes exist, the most important of which is a distrust of formal religious organizations. Rather than communal, received traditions, Nones favor an individualized, “do-it-yourself” spirituality that draws on multiple sources—a kind of spiritual “bricolage.”¹⁹ They deny that any one religion is uniquely true and insist that everyone must find his own spiritual path, appropriating, where necessary, elements from different faiths. They stress that divinity exists within each of us; wisdom consists in identifying and aligning with the divine force that flows through the universe and within oneself. Above all, Nones deny the value of structured religion, which they see as spiritual coercion: a dictatorship that forces believers to conform to received tradition, obey established hierarchies, and suppress spiritual experimentation.

Notwithstanding their rejection of tradition, Nones are themselves heirs to a very long tradition in American religion, stretching back at least to the nineteenth-century Transcendentalists and probably beyond that. But in their numbers, and the way they permeate mainstream culture, Nones represent something new. Many factors explain their rise: demography, politics, family, technology, a growing distrust of institutions generally. Perhaps, with the rise of the Nones, we are witnessing the turn to pantheism that Alexis de Tocqueville, that great observer of American society, predicted as the inevitable tendency of mass democracy. Whatever the reasons, a significant and increasing percentage of Americans has detached itself from organized religion.²⁰ For these Americans, the conventional understanding of religion “as a distinctive body of beliefs, a moral and ritual set of practices, and the organizational structures surrounding ideas and ideals of the sacred,” no longer reflects the norm.²¹ Nones represent a new, religious non-institutionalism that must inevitably have an impact on many aspects of American society—including law.

In this Working Paper, I explore what the rise of the Nones might mean for the definition of religion in American law. As a vehicle, I use a recent federal appeals court case from Virginia.²² The case concerns a fortune teller, “Psychic Sophie,” who argued that county zoning and licensing requirements interfered with her exercise of religion in violation of the Constitution and federal and state statutes. Psychic Sophie conceded that she did not believe in organized religion and subscribed to no one faith in particular. She drew from a variety of spiritual sources—Christian, Jewish, Hindu, New Age—and followed her “inner flow.”²³ This personalized set of beliefs and practices, she maintained, qualified as a religion meriting legal protection.

Psychic Sophie did not use the term to describe herself, but she qualifies as a None. And, as I will explain, the appeals court had little difficulty concluding that her set of beliefs did not amount to a religion for legal purposes. The question is much closer, though, than the court’s truncated treatment suggests. When one reads the relevant Supreme Court decisions, it is not clear why beliefs like Psychic Sophie’s do not qualify as a religion. Indeed, some of the factors that justify special legal

¹⁷ Lim et al., *supra* note 4, at 597.

¹⁸ ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 221 (1985).

¹⁹ ROSS DOUTHAT, *BAD RELIGION* 62 (2012) (“do-it-yourself”); Merrill M. Hawkins, Jr., *Personal Spirituality*, in 3 *FAITH IN AMERICA* 45, 49 (Charles H. Lippy, ed., 2006) (characterizing modern spirituality as “bricolage”).

²⁰ Michael Hout & Claude S. Fischer, *Why More Americans Have No Religious Preference: Politics and Generations*, 67 *AM. SOCIOLOGICAL REV.* 165, 188 (2002).

²¹ James Davison Hunter, *Law, Religion, and the Common Good*, 39 *PEPPERDINE L. REV.* 1065, 1065 (2013).

²² *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013).

²³ *Id.* at 564.

protection for religion in a liberal state—the need for state religious neutrality, the problem of discrimination against minorities, and the wish to respect personal autonomy—apply in her case.

To say that Nones should receive protection as a religion raises its own difficulties, however. In conventional understanding, the word “religion” implies a community of believers. And, as Tocqueville himself saw in the nineteenth century, it is precisely the communal aspect of religion that creates benefits for liberal democracy. Liberal democracy, Tocqueville wrote, inevitably leads to an apathetic individualism that weakens civic engagement and promotes the growth of despotism. By encouraging people to think of themselves as members of a community, religion discourages such individualism; by creating strong counterweights to the state, religious associations serve the cause of liberty. Extending legal protection to sole religious practitioners like Nones would fail to capture these crucial social benefits.

Allowing Nones to claim status as a religion could also open the door to fraudulent and unserious claims. How easy would it be to separate sincere Nones, like Psychic Sophie herself, from people who merely pretend to follow their inner flow in order to escape regulations they do not like? Or from people who lack any serious commitment whatever? Finally, recognizing Nones as a religion could create obstacles for efficient government. One should not exaggerate this concern; as I will explain, Nones would face difficulties obtaining accommodations under current doctrine. Still, the concern with administrative gridlock is not entirely notional. Recognizing Nones as a religion really could, in the Supreme Court’s words, “permit every citizen to become a law unto himself.”²⁴ If everyone can be his own religion, and the state must protect the exercise of religion, how would anything ever get done?

The case of Psychic Sophie, and the rise of the Nones generally, expose tensions in the way American law understands religion. As this is a Working Paper, I do not attempt to resolve those tensions or reach firm conclusions. Instead, I describe the problem and explain its significance, and address the principal arguments on either side. Soon, American law may have to find a way to come to terms with the rise of the Nones. This essay provides a starting point for analysis.

I. Psychic Sophie and the Definition of Religion

A. The Case of Psychic Sophie

Psychic Sophie—her real name is Patricia Moore-King—calls herself a spiritual counselor. For a fee, she conducts psychic readings and offers spiritual guidance. In her own words, she “‘brings forth the inherent wisdom of the God-self within each of her clients’ souls in order to help them achieve spiritual enlightenment.”²⁵ Mostly, she uses tarot cards and astrology to gain insight into her clients’ spiritual condition and offer advice on business, relationships, and other personal matters.²⁶ She dispenses advice over the internet and entertains at parties.²⁷ She appears to earn less than \$10,000 a year.²⁸

Chesterfield County, Virginia, where she offers her services, calls Psychic Sophie a “fortune teller,” which county regulations define as a person “engaged in the occupation of occult sciences, including a fortune-teller, palmist, astrologist, numerologist, clairvoyant, craniologist, phrenologist,

²⁴ Reynolds v. United States, 98 U.S. 145, 167 (1878).

²⁵ Moore-King v. County of Chesterfield, 819 F. Supp.2d 604, 611 (E.D. Va. 2011).

²⁶ Moore-King, 708 F.3d at 564.

²⁷ Moore-King, 819 F. Supp.2d at 623.

²⁸ Moore-King, 708 F.3d at 564.

card reader, spiritual reader, tea leaf reader, prophet, psychic or advisor.”²⁹ The county requires fortune tellers to obtain a license, undergo a criminal background check, and pay a \$300 fee. County zoning rules restrict fortune tellers to agricultural and industrial districts. Even in those districts, the county retains discretion to deny permits to fortune tellers on the basis of public need.³⁰

In August 2009, the county advised Psychic Sophie that she was operating without a license and that she would need to pay the required fee, along with interest and penalties. In response, she challenged the legality of the licensing and zoning requirements. Among other things, she argued, the requirements violated her right to the “free exercise of religion” under the First Amendment to the US Constitution, as well as her rights under a federal statute, the Religious Land Use and Institutionalized Persons Act (RLUIPA), which generally prohibits zoning regulations that impose a substantial burden on a person’s “religious exercise.”³¹

Psychic Sophie argued that her beliefs qualified as a religion for constitutional and statutory purposes. She conceded that she did not belong to any organized religion.³² “I am very spiritual in nature,” she stated, “yet I do not follow particular religions or practices, and ‘organized’ anything are not for me.” Instead, she explained, “I pretty much go with my inner flow, and that seems to work best.” She followed New Age, “a decentralized Western spiritual movement that seeks Universal Truth and the attainment of the highest individual potential.” For inspiration, she drew from “the ‘words and teachings of Jesus,’” which she found in tarot readings, as well as many other Western and Eastern sources:

Spirituality, astrology, Reiki, natural healing, meditation, mind-body-soul-spirit-chakra study, metaphysics in general, new age philosophy, psychology, human behavior, quantum physics, ancient history, philosophy, Kabala/Kabbalah, writing, jewelry making, reading (Manly P. Hall, Madame P. Blavatsky, Alice Bailey, and James Hillman are of special appeal), music, music, music!, and creativity in all forms are passions and interests of mine.³³

The trial court rejected Psychic Sophie’s claim and, on appeal, the US Court of Appeals for the Fourth Circuit did as well.³⁴ The appeals court conceded that she sincerely held her beliefs and that, under Supreme Court precedent, “beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit” protection.³⁵ But, the Fourth Circuit said, in order to constitute a “religion,” beliefs must amount to more than simply a personal philosophy. Some link to a community was necessary, some reference to an authority beyond oneself. To illustrate, the Fourth Circuit relied on *Wisconsin v. Yoder*,³⁶ a case in which the Supreme Court had distinguished the Old Order Amish, an insular, hyper-traditional Christian group with roots in Anabaptism, from the nineteenth-century Transcendentalist, Henry David Thoreau. Both the Amish and Thoreau had chosen seclusion from society, the *Yoder* Court reasoned, but only the Amish qualified as a religion. For them, quietism was not merely a personal and philosophical choice, but a “deep religious conviction, shared by an organized group, and intimately related to daily living.”³⁷ Indeed, if the state had to accommodate

²⁹ *Id.* at 563.

³⁰ *Id.* at 563-64.

³¹ *Id.* at 570.

³² The trial court noted that Psychic Sophie was an ordained minister in the “Universal Life Church,” an organization that confers free ordinations, virtually automatically, over the Internet. *Moore-King*, 819 F.Supp.2d at 611. Neither it nor the appeals court made anything of this fact, however.

³³ *Moore-King*, 708 F.3d at 564.

³⁴ The trial court ruled against Psychic Sophie in part because her fee-for-service model suggested that she was not a religion, but the Fourth Circuit did not address this argument.

³⁵ *Moore-King*, 708 F.3d at 571.

³⁶ 406 U.S. 205 (1972).

³⁷ *Moore-King*, 708 F.3d at 571 (quoting *Yoder*).

merely personal, philosophical preferences like Thoreau's, anarchy would result. "[T]he very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."³⁸

Applying *Yoder*, the Fourth Circuit concluded that Psychic Sophie's beliefs did not qualify as a religion. "That a wide variety of sources—the New Age movement, the teachings of Jesus, natural healing, the study of metaphysics, etc.—inform and shape [her] 'inner flow,'" the court explained, "does not transform her personal philosophical beliefs into a religion anymore than did Thoreau's commitment to Transcendentalism and idealist philosophy render his views religious."³⁹ Because the court determined that her beliefs did not qualify as a religion, it did not think it necessary to analyze whether the county regulations in fact infringed on the exercise of those beliefs in an illegal way.

B. Defining Religion in American Law

The Fourth Circuit devoted not much more than a page to Psychic Sophie's claim to be a religion. The issue is not as straightforward as this rather truncated treatment would suggest, however. The definition of religion in American law is an open and perplexing question. Scholars have offered essentialist definitions that focus on some inherent characteristic of religion, like a belief in God; functionalist definitions that look to the role a belief system has in an adherent's life; and analogical definitions that rely on similarities to systems everyone concedes to be religious.⁴⁰ Analogical definitions, especially Kent Greenawalt's version, seem to be favored at the moment, but no approach has achieved a consensus.⁴¹ Indeed, a new wave of scholarship suggests that a clear legal definition of religion is impossible; or at least unnecessary, since religion does not merit protection as a distinct category.⁴²

One reason for the lack of academic consensus is the fact that the Supreme Court itself has failed to offer consistent guidance. A handful of decisions address the meaning of religion, but the Court has never settled on a single definition. Indeed, the decisions are rather inconsistent. For example, in a couple of nineteenth-century cases involving the Mormon Church, the Court indicated that religion denotes a belief in God.⁴³ "The term 'religion'" in the First Amendment, the Court said in *Davis v. Beason*, "has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."⁴⁴ Not just any Creator: the Court understood religion to mean a system of beliefs consistent with traditional Christianity. In *Davis*, for example, the Court scoffed at the idea that Mormonism could be a religion for constitutional purposes—notwithstanding the fact that Mormonism quite obviously holds a belief in God—because Mormonism advocated polygamy, a practice condemned "by the general consent of the Christian

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ For an excellent, comprehensive treatment of the various academic theories, see W. Cole Durham, Jr. & Elizabeth A. Sewell, *Definition of Religion*, in *RELIGIOUS ORGANIZATIONS IN THE UNITED STATES* 3 (James A. Serritella et al., eds., 2006).

⁴¹ KENT GREENAWALT, *I RELIGION AND THE CONSTITUTION* 137-46 (2006); see Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 WM. & MARY L. REV. 1831, 1905-07 (2009) (discussing analogical definition).

⁴² *E.g.*, WINNIFRED SULLIVAN, *THE IMPOSSIBILITY OF RELIGIOUS FREEDOM* 150 (2005) (impossible); Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 809 (2009) (unnecessary). For arguments that religion does not merit protection as a distinct category, see BRIAN LEITER, *WHY TOLERATE RELIGION?* (2013); Micah Schwartzman, *What If Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012).

⁴³ *Davis v. Beason*, 133 U.S. 333 (1890); *Reynolds v. United States*, 98 U.S. 145 (1878).

⁴⁴ *Davis*, 133 U.S. at 342.

world.”⁴⁵ To call advocacy of polygamy “a tenet of religion,” the Court stated, would “offend the common sense of mankind.”⁴⁶

The Court has never expressly repudiated these nineteenth-century cases, but subsequent decisions reject the idea that religion requires a belief in God, much less the God of traditional Christianity. An offhand reference in a 1961 case implied that the Court no longer equated religion with theism.⁴⁷ And, in two conscientious objector cases from the Vietnam Era, the Court construed statutory language referring to “religious belief” to cover non-theistic as well as theistic convictions. The Draft Act exempted persons opposed to war as a matter of “religious ... belief,” defined as “an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code.”⁴⁸ In *United States v. Seeger*, the Court construed this statutory language— notwithstanding the reference to “Supreme Being” and the exclusion of “essentially ... philosophical views”—to cover “a ‘belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.’”⁴⁹ A religious belief need not derive from a faith in God, the Court said. The test was “whether a given belief,” even if non-theistic, “is sincere and meaningful” and “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”⁵⁰ The belief could not be completely subjective, but as long as it related in some way to an external commitment, it could qualify as “religious.”⁵¹ In *United States v. Welsh*, a plurality reiterated that the phrase “religious ... belief” in the Draft Act covered “purely ethical or moral” —one might say, philosophical—“beliefs.”⁵²

The Draft Act cases thus stand for the proposition that intensely personal ethical or moral beliefs can qualify as religion. A couple of years later, though, the Court reverted to a more conventional definition in *Wisconsin v. Yoder*, the decision involving the Amish that the appeals court relied on so heavily in Psychic Sophie’s case. Unlike the Draft Act cases, which collapsed the distinction between the religious and philosophical, *Yoder* insisted on a bright line between the two. Religion, the Court now stated, denoted a commitment to a traditional faith community; merely personal, philosophical convictions did not qualify. That was the point of the *Yoder* Court’s reference to Thoreau. Like the Amish, the Court explained, Thoreau had left society to pursue an alternative lifestyle. But he had been motivated by “subjective” and purely “secular considerations.”⁵³ He had no followers and lived an “isolated” existence.⁵⁴ The Amish, by contrast, had a 300-year history as a tight-knit, organized faith. They lived according to strict and detailed rules enforced by a formal church structure.⁵⁵ These factors distinguished the Amish from Thoreau and marked them as a religion for constitutional purposes. Of course, the Draft Act cases had indicated that purely ethical, secular worldviews like Thoreau’s could also qualify as religious.⁵⁶ If the Court was troubled by the inconsistency, however, it did not say so.

⁴⁵ *Id.* at 343.

⁴⁶ *Id.* at 342.

⁴⁷ *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961).

⁴⁸ *United States v. Seeger*, 380 U.S. 163, 165 (1965).

⁴⁹ *Id.* at 166.

⁵⁰ *Id.*

⁵¹ *See id.* at 185-87.

⁵² *Welsh v. United States*, 398 U.S. 333, 340 (1970) (plurality opinion).

⁵³ *Yoder*, 406 U.S. at 216.

⁵⁴ *Id.*

⁵⁵ *See id.* at 216-19.

⁵⁶ *See Nelson Tebbe, Nonbelievers*, 97 VA. L. REV. 1111, 1155 (2011) (discussing tension between *Yoder* and the Draft Act cases).

Two final decisions complete the list—and confuse matters further. For having suggested in *Yoder* that religion means following the precepts of an organized faith community, the Court suggested rather the opposite in two subsequent cases. In *Thomas v. Review Board*,⁵⁷ a Jehovah's Witness quit his job at a steel factory when the factory required him to work on weapons. He argued that working on weapons would violate his religious beliefs. He would not object to working on steel that might be used in weapons, he said, just not the weapons themselves. This position was not entirely coherent, of course, and did not seem to be dictated by the Jehovah's Witness faith. Another Jehovah's Witness at the factory had no objection to working on weapons. Nonetheless, the Court held that the worker's objection was a religious belief protected by the First Amendment. "[R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others," the Court stated, in words the Fourth Circuit would quote in *Psychic Sophie's* case.⁵⁸ Nor did it matter that other Jehovah's Witnesses failed to share the worker's objection. "[T]he guarantee of free exercise," the Court said, "is not limited to beliefs that are shared by all of the members of a religious sect."⁵⁹ The Court noted that some religious interpretations might be "so bizarre"—perhaps the word for which the Court was looking was "idiosyncratic"—as to lose First Amendment protection.⁶⁰ But that was not the case with respect to this factory worker.

Thomas thus suggests that personal beliefs disconnected from the mainstream of a faith community can qualify as religion after all.⁶¹ The Court continued this theme several years later in *Frazee v. Illinois Department of Employment Security*.⁶² In *Frazee*, the state denied unemployment benefits to a claimant who had turned down a job that would have required him to work on Sundays. He argued that working on Sundays would violate his religious convictions as a Christian. The state objected that the claimant did not belong to any church—he was an independent Christian without formal affiliation—and thus, by definition, could not claim to be acting out of religious belief. The Court dismissed the state's argument as a non sequitur. "[M]embership in an organized religious denomination" would surely "simplify the problem of identifying sincerely held religious beliefs," but a claimant need not demonstrate that he was following the tenets of a religious body to which he belonged.⁶³ There was nothing "bizarre," the Court said, quoting the language of *Thomas*, about a Christian asserting that his religion required him to avoid work on Sundays.⁶⁴

* * *

Two lessons follow from this quick survey of the Supreme Court's opinions. First, the Court's jurisprudence on the definition of religion is quite muddled. For the Court, religion means a belief in God—except when it does not. Religion means a commitment to a traditional, organized faith community—except when it does not. Religion excludes personal, philosophical convictions—except when it does not. And a court cannot evaluate a belief's logical consistency or coherence with mainstream religious interpretations—except when it can.

Second, returning to *Psychic Sophie*, one sees that notwithstanding the Fourth Circuit's rather summary dismissal, the question whether her beliefs qualify as a religion is a difficult one. *Psychic Sophie* does not belong to a traditional, organized religious community like the Amish, but neither did

⁵⁷ 450 U.S. 707 (1981).

⁵⁸ *Id.* at 714.

⁵⁹ *Id.* at 715-16.

⁶⁰ *Id.* at 715.

⁶¹ See Eisgruber & Sager, *supra* note 42, at 815.

⁶² 489 U.S. 829 (1989).

⁶³ *Id.* at 834.

⁶⁴ *Id.* at 834 n.2.

the claimant in *Frazee*. Her idiosyncratic and conflicting beliefs do not make a great deal of sense to outsiders, but neither did the plaintiff's in *Thomas*. She has an intensely subjective worldview that does not depend on an orthodox belief in God, but so did the petitioners in the Draft Act cases. When one considers the Supreme Court's jurisprudence, it's not at all clear that Psychic Sophie's beliefs don't qualify as a religion for purposes of American law.

II. The Challenge of the Nones

Historically in America, one could have dismissed Psychic Sophie's case as an interesting anomaly without practical significance—what American lawyers call a “sport.” The Supreme Court's jurisprudence is muddled, but it has worked reasonably well because American religion has tended to follow conventional patterns. Religion has mostly meant organized traditions everyone would recognize: the classic Christian communions and their offshoots like Seventh-Day Adventists and Christian Scientists; the different branches of Judaism; and, more recently, Buddhism, Hinduism, and Islam. America has always had religious individualists, of course. Thomas Paine famously remarked, “My own mind is my own church,”⁶⁵ a sentiment Psychic Sophie would no doubt share, and “seeker spirituality” has existed since colonial times, especially since the nineteenth century.⁶⁶ But Transcendentalism, Theosophy, and the like were elite phenomena. They had devotees, but not mass followings.⁶⁷ American law did not need to address them.

A different situation exists now. Unlike earlier idiosyncratic believers, today's Nones cannot be dismissed as “a small group of ‘kooks’ who just don't fit into respectable American society.”⁶⁸ Nones comprise perhaps one-fifth of the adult population and are perhaps the third largest religious group in the country. To quote Charles Taylor, the “ethic of authenticity” and “expressive individualism” that fascinated Romantic elites like the Transcendentalists has gone mainstream.⁶⁹ Indeed, with the Nones, we may be witnessing the triumph of pantheism that Tocqueville predicted in the nineteenth century.⁷⁰ An egalitarian culture like America's, Tocqueville wrote, eventually rejects all distinctions as illegitimate and artificial, including the distinction between God and His creation. Such a culture eventually fastens on pantheism, which teaches that everyone, without distinction, shares in the divine force that moves the universe. When today's Nones insist that God exists equally within each of us, and that we need only follow our inner flow to be one with the universe, they express the pantheist metaphysics Tocqueville predicted would be the inevitable result of mass democracy.

I lack space to detail the specific factors that have led to the rise of the Nones. A few merit mention, though. The first is demography. As I have explained, Nones skew young. According to Pew, they make up approximately one-third of Americans under the age of 30.⁷¹ Some sociologists think young Nones dislike organized religion because they associate it with the political right, especially on issues like homosexuality.⁷² People tend to become more politically conservative and religious as they

⁶⁵ KERRY S. WALTERS, *THE AMERICAN DEISTS* 213 (1992).

⁶⁶ ROBERT C. FULLER, *SPIRITUAL, BUT NOT RELIGIOUS* 154 (2001).

⁶⁷ *See id.* at 154-55. For a contrary argument that non-traditional movements have had a major role in American religion, see CATHERINE L. ALBANESE, *A REPUBLIC OF MIND AND SPIRIT* 4 (2007).

⁶⁸ FULLER, *supra* note 66, at 155.

⁶⁹ CHARLES TAYLOR, *A SECULAR AGE* 299 (2007).

⁷⁰ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 425-26 (Harvey C. Mansfield & Delba Winthrop trans. & eds. 2000) [*hereafter* *DEMOCRACY IN AMERICA*]. For an excellent recent discussion, see Robert J. Delahunty, *Tocqueville on Pantheism: Part I*, Center for Law and Religion Forum, <http://clrforum.org/2013/08/29/tocqueville-on-pantheism-part-i/> (2013).

⁷¹ Pew Study, *supra* note 1.

⁷² *See* PUTNAM & CAMPBELL, *supra* note 10, at 130.

age, and some young Nones will no doubt affiliate with organized religion as they grow older. But the noticeable generational decline in religious affiliation will likely have long-term societal effects.

Second, changes in family structure, in particular, high rates of religious intermarriage and divorce, have an important role. According to Putnam and Campbell, the rate of religious intermarriage in America doubled over the course of the last century, so that today about half of Americans who marry choose a spouse from a different faith tradition. In some of these marriages, one spouse takes the religion of the other, so that the percentage of American marriages that remain interfaith over time is around one-third—still a high percentage, historically.⁷³ One would expect children of mixed marriages to have weaker religious affiliations than children of single-faith marriages, and there is evidence for this.⁷⁴ Indeed, Putnam and Campbell write, “[t]he most important factor predicting religious retention is whether a person’s family of origin was religiously homogeneous and observant, or not. . . . [C]hildren of mixed marriages are more likely to become nones or to attend religious services rarely, even if they remain nominally affiliated with a religion.”⁷⁵ Moreover, “the long-term effect of parental divorce” appears to be “a major factor driving” the rise of the Nones.⁷⁶ According to a recent study, “young adults who are from divorced families are significantly less likely to identify themselves as ‘religious’ than their counterparts from intact families.”⁷⁷ Children of divorce may have less trust in institutions and authority figures generally, which may translate into a rejection of religious affiliation.⁷⁸ Finally, more and more people in America never marry or have children, and this group is particularly unlikely to affiliate with a religion.⁷⁹

Third, technology has contributed to the rise of the Nones. The Internet has opened up vast, new resources for spiritual seekers. Syncretism has never been so easy: all one needs is a laptop and a search engine. You want to find out what works for you in exotic spiritual traditions? No need to travel around the world or even find a local community of practitioners. Just go online. As Olivier Roy writes, the Internet allows people to “‘consume’” religion in entirely new ways.⁸⁰ People can adopt beliefs and practices from across the globe in a “loose,” “à la carte” fashion, without ever leaving home or embedding themselves in a foreign culture.⁸¹

The rise of the Nones constitutes an important, likely enduring cultural shift. American law may soon need to address it. Conflicts between Nones and the regulatory state, and demands for accommodation, may well increase in the years ahead. To be sure, even if they were recognized as a religion, Nones would face some hurdles obtaining accommodations under present law. Nones would have to show that their idiosyncratic beliefs actually require (or forbid) them to engage in activities the law forbids (or requires).⁸² Such a showing may be difficult: what sort of conduct does being a None dictate? Moreover, like conventional believers, Nones would have to deal with the Supreme Court’s 1990 decision in *Employment Division v. Smith*, which greatly limits the possibility of religious

⁷³ See *id.* at 148-49.

⁷⁴ See WADE CLARK ROOF, *SPIRITUAL MARKETPLACE* 244 (1999).

⁷⁵ PUTNAM & CAMPBELL, *supra* note 10, at 142.

⁷⁶ Jiexia Elisa Zhai et al., “*Spiritual, But Not Religious:*” *The Impact of Parental Divorce on the Religious and Spiritual Identities of Young Adults in the United States*, 49 REV. RELIGIOUS RESEARCH 379, 392 (2008).

⁷⁷ *Id.* at 391.

⁷⁸ See *id.* at 383.

⁷⁹ See CHAVES, *supra* note 2, at 52-53.

⁸⁰ OLIVIER ROY, *HOLY IGNORANCE* 160 (2010).

⁸¹ *Id.* at 184 (noting that religions today can “create their market and compose *à la carte* menus connecting elements from different sources”).

⁸² Cf. GREENAWALT, *supra* note 41, at 151 (discussing claims for “religious” exemptions by atheists or agnostics).

accommodations under the First Amendment.⁸³ Recognizing Nones as a religion, in other words, would not guarantee them success in American courts.

One should not dismiss Nones' chances, however. First, it should not be too difficult for Nones to show, in particular cases, that their beliefs require them to act in certain ways. Consider Psychic Sophie, for example. Her case never reached this stage, but couldn't she have argued plausibly that following her inner flow required her to offer spiritual counseling in ways that conflicted with county regulations? Some Nones might argue that their beliefs require them to wear certain symbols or eat certain diets; others might claim that their beliefs forbid inoculations or military service. These examples are not so implausible. As Nelson Tebbe has argued in another context, coming up with plausible claims for why one's beliefs dictate certain conduct is limited only by one's imagination.⁸⁴

Second, *Smith* may pose less of a barrier than many believe. As my colleague Marc DeGirolami points out, the case is riddled with exceptions that litigants have exploited over the years; the rule of *Smith* is much less rigorous and predictable than its supporters might have hoped.⁸⁵ Moreover, state and federal statutes are more generous than *Smith* when it comes to religious accommodation. For example, RLUIPA, the federal statute on which Psychic Sophie relied, prohibits zoning regulations that substantially burden religious exercise unless the government shows the regulations constitute the least restrictive means of furthering a compelling governmental interest.⁸⁶ If the Fourth Circuit had concluded that Psychic Sophie was engaged in the exercise of religion, it's not clear Chesterfield County could have made such a showing. If Nones qualify as a religion for purposes of RLUIPA and similar statutes, the impact on government regulations across the country could be great.

In short, one cannot dismiss the debate about Nones as academic. Whether Nones qualify as a religion for legal purposes is a question with potentially significant real-world consequences. In the remainder of this Working Paper, I will sketch the important concerns on both sides of the controversy. When one considers the policies that justify protecting religious exercise in a liberal state, one finds good reasons to include Nones in a definition of religion—and good reasons to exclude them.

A. Reasons to Include Nones in a Definition of Religion

1. State Religious Neutrality

One important reason for protecting religious exercise in a liberal state is the wish to maintain state religious neutrality. To the extent possible, the argument goes, the state should avoid taking positions on the substance of religious truth. For some, following Locke, this position is axiomatic.⁸⁷ The concerns of civil government and religion differ qualitatively; for civil government to take a position on religious truth would amount to a category error. But practical concerns support state religious neutrality as well. History contains many episodes in which sects attempted to gain control of civil government in order to punish their rivals. Removing civil government from religious debate altogether seems a plausible way to eliminate such episodes and allow people of different religions to live together peaceably.⁸⁸ This is especially true in religiously diverse societies like those of the

⁸³ 494 U.S. 872 (1990).

⁸⁴ Tebbe, *supra* note 56, at 1156-57 (discussing possible accommodation claims by nonbelievers).

⁸⁵ MARC O. DEGIROLAMI, *THE TRAGEDY OF RELIGIOUS FREEDOM* 161 (2013).

⁸⁶ 42 U.S.C. §§ 2000cc(a) (2000).

⁸⁷ See Durham and Sewell, *supra* note 40, at 58 (quoting Locke).

⁸⁸ See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317 (1996).

contemporary West. To be sure, what counts as neutral in one culture may not qualify in another.⁸⁹ But the basic point that the state should not involve itself in religious controversies remains.

These concerns favor treating Nones as a religion. As Douglas Laycock writes, the most crucial divide in American religion today is not between particular religions—Catholic versus Evangelical—but between people who hold traditional, theistic beliefs, in whatever religion, and those who do not.⁹⁰ These two groups comprise the opposing armies in the so-called culture wars. Each group is suspicious of the other and very sensitive to slights. Informing perhaps a fifth of the American public that its spiritual beliefs are not sufficiently coherent or conventional to qualify as religion, while extending protection to traditional faiths, could cause serious offense. A wiser, more emollient approach would be to extend protection both to traditional believers and more unusual practitioners like Nones.

2. Preventing Discrimination

Another reason for protecting religious exercise is to prevent discrimination against minorities. Christopher Eisgruber and Lawrence Sager have championed this view. Majority religions, they write, often find it easy to neglect or disparage the concerns of minority religions, particularly unconventional minority religions.⁹¹ Majorities often enact legislation that slights the legitimate interests of minority religions and unfairly burdens their exercise. In smaller locations where one religion dominates, the danger is especially acute. A school district, for example, might ban students from wearing headgear, notwithstanding the effect such a ban would have on Muslim girls who wear headscarves. The majority may not intend to create unfair burdens for minority religions—in the headscarves example, the school district may simply be trying to promote a uniform appearance for students—but the disproportionate impact would exist all the same.

The concern with prohibiting discrimination also suggests the law should recognize Nones as a religion. Although Nones comprise perhaps a fifth of the American population, they are distributed unevenly, and in some parts of the country are very thin on the ground.⁹² It's easy to envision situations in which a local majority would treat Nones unfairly. To borrow an example from Eisgruber and Sager, suppose local zoning restrictions forbid persons from running soup kitchens, but provide an exception for groups that operate soup kitchens from a sense of religious duty. Such an exception would no doubt cover a church that operates a soup kitchen out of Christian charity. Should the exception not also cover a None whose “inner flow” tells her she must feed the hungry? Allowing an exception for Christians, but not Nones, would seem unfair.⁹³

3. Respect for Individual Believers

Perhaps the most powerful argument for protecting religious exercise in a liberal state is respect for personal autonomy. Subject to the constraints of social order, the liberal state defers to individual citizens with respect to moral judgments and questions about meaning, lifestyle, family and other intimate relations.⁹⁴ The state does so in order to promote personal dignity and, ultimately, happiness. This is not the place to develop a theory of liberalism, but one could argue that respect for personal

⁸⁹ See Mark L. Movsesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J. L. & RELIGION 338 (2012).

⁹⁰ Laycock, *supra* note 88, at 327.

⁹¹ See Eisgruber & Sager, *supra* note 42, at 826-30.

⁹² On the regional distribution of religious groups in America, including Nones, see MARK SILK & ANDREW WALSH, *ONE NATION, DIVISIBLE* (2008).

⁹³ See Eisgruber & Sager, *supra* note 42, at 807-08.

⁹⁴ See Durham & Sewell, *supra* note 40, at 41.

autonomy is the liberal state's most crucial commitment, the one on which everything else depends. The Supreme Court suggested as much in a famous passage from one of its abortion cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*. "At the heart of liberty," the Court wrote, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."⁹⁵

On this theory, the state protects religious exercise, not because religion is important in itself, but because religion is important to individual believers. For many people, certainly most Americans, religious commitments are crucial to answering questions about meaning and "the mystery of human life." Religion offers guidance at difficult moments, comfort in times of loss, and a sense of purpose at all times. Religion forms an essential and enduring part of the believer's identity—his "personhood," to use the Court's word. For the believer, religious commitments are compelling in ways political, ideological, and philosophical commitments are not. Indeed, because many religions teach that there are eternal consequences for one's behavior, forcing a believer to choose between his religion and the commands of the state may cause grave psychological harm.⁹⁶ To forbid what the believer's religion requires, or require what the believer's religion forbids, may pose difficulties unlike any other the believer encounters in life.

To prevent a believer from exercising his religion thus injures him in a profound way. And the injury occurs whether the believer is part of an organized faith tradition or, like Psychic Sophie, an individual practitioner. For a None, following one's inner flow might be equally as compelling, equally as essential to integrity and self-respect, as a Catholic's conforming to the magisterium of the Church. Recall the Draft Act cases. The conscientious objectors in those cases, though not conventionally religious, no doubt experienced the demands of conscience as binding in ways religious believers would recognize. As the late Ronald Dworkin observed, protecting religious freedom in order to honor personal dignity and autonomy "provides no ground for limiting that freedom to the orthodox religions of believers."⁹⁷

In short, the wish to promote state neutrality, avoid discrimination, and respect individual believers all counsel in favor of including Nones in a definition of religion. But serious objections exist as well.

B. Reasons to Exclude Nones from a Definition of Religion

1. Conventional Meaning

Law is not an academic exercise, but a social tool. The Constitution and statutes like RLUIPA are meant to guide ordinary people, not only experts. When one defines "religion" for legal purposes, therefore, one should choose a meaning consistent with conventional understanding—with the ordinary social meaning of the term.⁹⁸ Lawyers and judges differ whether the relevant conventions are those that existed at the time of enactment or new ones that have evolved over time. For our purposes, though, it is unnecessary to resolve debates about originalism. The point is that the legal definition of religion should conform to what most people understand the word to mean. Throughout history and up to today, religion has meant a communal phenomenon.

⁹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

⁹⁶ See Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 598.

⁹⁷ RONALD DWORKIN, RELIGION WITHOUT GOD 114 (2013).

⁹⁸ See GREENAWALT, *supra* note 41, at 143.

The word itself implies this. “Religion” probably derives from the Latin *religare*, which means “to bind.”⁹⁹ “Religion” thus suggests a link connecting a believer to something else—to God, of course, but also, crucially, to other believers. In conventional practice, religion almost always expresses itself in communal worship. Reciting the creed, participating in common rituals, singing hymns together—these things signal to believers that they belong to a collective body.¹⁰⁰ In fact, some argue that religion has an adaptive function as a means of promoting group survival; the instinct to join together with others in worship may be an aspect of evolved human nature.¹⁰¹ Whether one credits this explanation or not, the fact that it typically expresses itself in groups has led most contemporary religious studies scholars to define religion in terms of community—an understanding that goes back, at least in part, to Durkheim.¹⁰²

Including Nones within a legal definition of religion, therefore, would be inconsistent with the conventional meaning of the term. This is not to denigrate Nones’ spirituality. No doubt, most Nones sincerely believe that following their inner flow aligns them with the transcendent. Nones do not practice a religion, however, as that term is commonly understood.

2. Overcoming Individualism: An Argument from Tocqueville

The communal character of religion provides important social benefits for the liberal state. Religion encourages people to associate with and feel responsibility for others and to engage with them in common endeavors. Religion promotes altruism and neighborliness; it mitigates social isolation. To be sure, religion does not always encourage fellowship, and to the extent a religion promotes sedition or violence against other citizens, the liberal state does not benefit. On the whole, though, religion tends to discourage the self-centeredness and apathy that liberal democracy inevitably seems to create.

Tocqueville understood this best. In *Democracy in America*, he described the tendency democratic societies have to what he called “individualism.” Democracy, he explained, accustoms each person to think of himself as equal to everyone else. Because everyone is equal, there is no reason to defer to traditional authority or social rank; in deciding what is best, each citizen must rely on his own judgment and look out for his own interests.¹⁰³ In some sense, of course, this self-reliance is a good thing; at least Americans have long thought so. But Tocqueville believed the attitude led inexorably to “individualism,” which he defined as the “sentiment that disposes each citizen to isolate himself from the mass of those like him and to withdraw to one side with his family and his friends, so that after having thus created a little society for his own use, he willingly abandons society at large to itself.”¹⁰⁴ In fact, Tocqueville continued,

As conditions are equalized, one finds a great number of individuals who, not being wealthy enough or powerful enough to exert a great influence over the fates of those like them, have nevertheless acquired or preserved enough enlightenment and goods to be able to be self-sufficient. These owe nothing to anyone, they expect so to speak nothing from anyone; they are in the habit of always considering themselves in isolation, and they willingly fancy that their whole destiny is in their hands.¹⁰⁵

⁹⁹ NICHOLAS WADE, *THE FAITH INSTINCT* 2 (2009).

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 9, 58.

¹⁰² *See* Tebbe, *supra* note 56, at 1134 & n.102 (discussing a leading definition of religion). For a helpful discussion of Durkheim, *see* GRACE DAVIE, *THE SOCIOLOGY OF RELIGION* 30 (2007).

¹⁰³ *DEMOCRACY IN AMERICA*, *supra* note 70, at 404; *see also id.* at 180.

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *Id.* at 483-84.

This attitude poses two great dangers for a democratic society. First, it makes it difficult to motivate citizens to participate in common projects on which society depends: public safety, improvements, hospitals, schools, and the like. True, government can compel participation. But compulsion cannot inspire enthusiasm, and if people's affections are not engaged, such projects are likely to fail.¹⁰⁶ Second, social isolation makes it much easier for despotism to arise. Indeed, Tocqueville wrote, despotism thrives on individualism.¹⁰⁷ The despotic state desires nothing more than for individual citizens to feel isolated from and indifferent to the concerns of others, so that the state can easily divide and dominate them all. This is as true for a democratic despotism, in which an elected majority exercises tyranny over its fellow citizens, as it is for dictatorships. Individual citizens, on their own, are no match for state power.

Tocqueville believed that American democracy had overcome the tendency to individualism by promoting voluntary associations. Voluntary associations—by which Tocqueville meant both political parties and civic associations, including religious organizations—encourage people to look beyond themselves and see one another as laborers in a common cause.¹⁰⁸ They teach the habits of reciprocity and fellowship essential to accomplishing great enterprises. Moreover, associations, along with local governments, “mediate between the individual and the centralized state” and thus mitigate the tyranny of the majority.¹⁰⁹ They “check, pressure, and restrain the tendencies of centralized government to assume more and more administrative control.”¹¹⁰ Individual citizens lack power to resist the state, but collections of citizens stand a much better chance.

Experience has shown Tocqueville right about the value of voluntary associations. And religious associations are particularly good at promoting social engagement. “In one survey of twenty-two different types of voluntary associations,” sociologist Robert Putnam reports, “from hobby groups to professional associations to veterans groups to self-help groups to sports clubs to service clubs, it was membership in religious groups that was most closely associated with other forms of civic involvement, like voting, jury service, community projects, talking with neighbors, and giving to charity.”¹¹¹ Participation in religious organizations correlates with involvement in secular organizations as well.¹¹² Regular churchgoers are more likely than non-religious people to donate money and volunteer time to charitable causes, including secular causes.¹¹³ They are more likely to belong to community organizations, work on community projects, participate in town meetings and other political activities, and press for social reform.¹¹⁴ They are, quite simply, “nicer” and more neighborly.¹¹⁵ And, when it comes to defying state oppression, no groups have been more effective than religious associations, which can inspire members to truly heroic acts of resistance, as dictators down the centuries have learned.

Extending the definition of religion to include Nones would fail to capture these benefits. Nones are the quintessential religious loners; indeed, rejection of religious organizations is their most salient characteristic. They are precisely the sort of isolated individualists that Tocqueville feared would be uninterested in community and unable to stand up to centralized authority. This is not to say that

¹⁰⁶ See *id.* at 491-92.

¹⁰⁷ See *id.* at 485.

¹⁰⁸ For Tocqueville's discussions of associations, see *id.* at 180-86, 485-92.

¹⁰⁹ BELLAH ET AL., *supra* note 18, at 38.

¹¹⁰ *Id.*

¹¹¹ ROBERT D. PUTNAM, *BOWLING ALONE* 67 (2000).

¹¹² *Id.* at 66.

¹¹³ PUTNAM & CAMPBELL, *supra* note 10, at 444-54.

¹¹⁴ *Id.* at 454-56.

¹¹⁵ *Id.* at 444.

Nones are ill motivated. For most Nones, rejecting organized religion is doubtless a considered, principled stand. But Nones cannot offer the liberal state the benefits that come from religious communities.

3. Assuring Sincerity and Seriousness

As I have explained, the liberal state protects religious exercise in part out of respect for the dignity and happiness of individual believers. Religious commitments are often crucial to a believer's sense of himself and the world, and the state wishes to avoid the psychological damage that may occur if it forces the believer to choose between his religious commitments and civic obligations. This assumes, though, that the believer's commitments are sincere and serious. The state need not defer to fraudulent commitments a person only pretends to have—to avoid some civic obligation, for example.¹¹⁶ Nor need the state defer to frivolous and transitory commitments. A pluralist democracy requires everyone to compromise occasionally. People cannot expect to receive exemptions on the basis of each passing whim.

Evaluating the sincerity and seriousness of a religious belief is notoriously difficult, however, especially for a state committed to religious neutrality.¹¹⁷ Of course, a civil court may not inquire whether a belief is true, only whether the claimant in fact holds the belief.¹¹⁸ But subjective honesty is very hard to prove; often, one must rely on the self-serving statements of the claimant. Moreover, religious beliefs often seem preposterous to outsiders. From the conclusion that a belief is preposterous, it is an easy leap to the conclusion that the belief is insincere; the state might dismiss a belief as fraudulent simply because the belief is unusual or heterodox.¹¹⁹ Finally, disparaging a belief as insincere or unserious can cause grave and unnecessary offense. It is one thing for a court to tell a citizen that compelling reasons of state preempt her claim to a religious exemption. It is quite another to tell her that her beliefs are too incredible and trivial to merit respect.

These difficulties are especially acute when it comes to evaluating Nones. At least with respect to a communal religion, a believer can point to other people who share his commitments. Most likely, he can demonstrate a continuous tradition of teaching and worship and an organized body that enforces discipline. Factors like these provide objective evidence of the seriousness and sincerity of the believer's claims.¹²⁰ Nones cannot rely on such evidence, however. A sole religious practitioner like Psychic Sophie may be sincere; in fact, the Fourth Circuit took pains to state that she was sincere.¹²¹ But how is one to know, really, whether she is following her inner flow, as she says, or simply seeking to escape county zoning and licensing rules? And what if her inner flow were to change direction tomorrow?

These considerations counsel against including Nones within the definition of religion. With respect to Nones, it is probably best to avoid questions of sincerity and seriousness by saying, categorically, that a sole practitioner without any link to an organized tradition cannot claim to exercise a religion. True, this conclusion would be in some tension with *Thomas* and *Frazee*. But it would be consistent with *Yoder*. Moreover, both in *Thomas* and *Frazee*, the plaintiffs had some links to organized religions. And, as the Court in those cases emphasized, neither plaintiff presented a claim that was particularly idiosyncratic in the context of those religions.

¹¹⁶ See Durham and Sewell, *supra* note 40, at 52-53.

¹¹⁷ See *id.* at 53.

¹¹⁸ See *United States v. Ballard*, 322 U.S. 78, 86-88 (1944).

¹¹⁹ See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 248 (1989).

¹²⁰ See GEORGE P. FLETCHER, *LOYALTY* 95 (1993).

¹²¹ *Moore-King v. County of Chesterfield*, 708 F.3d 560, 571 (2013).

4. Courting Anarchy

Finally, treating Nones as a religion could create obstacles for government in a regime, like America's, that grants at least some room for religious accommodations. The Supreme Court has long warned of the disorder that could result from allowing believers to claim exemptions from otherwise applicable laws. In one of its nineteenth-century cases involving the Mormon Church, for example, the Court held that a defendant could not escape prosecution for bigamy because of his belief that plural marriage was a religious obligation. "To permit this," the Court held, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."¹²² More than a century later, the Court repeated this theme in *Employment Division v. Smith*, the case which held that, for constitutional purposes, religious accommodations are not necessary in the context of neutral, generally applicable laws. To require the state to grant accommodations in those circumstances, *Smith* suggested, would "court anarchy" by creating "a system in which each conscience is a law unto itself."¹²³

One should not exaggerate this concern. Congress and many state legislatures responded to *Smith* by passing statutes like RLUIPA and RFRA, which require the state to accommodate believers in situations where the state lacks a compelling interest in enforcing its law, and government has not ground to a halt as a result. Moreover, as I have shown, even if courts did recognize Nones as a religion, obstacles to religious accommodation would remain. Still, allowing Nones to claim religious exemptions could cause unnecessary administrative gridlock. In a country of 300 million people, one-fifth of whom claim to define religion entirely for themselves, the potential for conflict with state rules would not be insignificant. Indeed, because the beliefs of Nones are, almost by definition, idiosyncratic, it would be difficult for government to anticipate what the claims for accommodation would be and craft legislation to avoid conflict.¹²⁴ Even if Nones were to lose most of the cases, merely litigating them all could create strains on cash-strapped governments.

IV. Conclusion

Psychic Sophie's case strikes us as unusual today, but it may not do so for long. Nones now comprise perhaps the third largest "religious" group in the country. It seems only a matter of time before claims like hers become commonplace. These claims will put pressure upon the definition of religion in American law; how American law will respond to that pressure remains to be seen. This Working Paper has offered a framework for thinking about that vital question.

¹²² *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

¹²³ *Employment Division v. Smith*, 494 U.S. 872, 888 ("courting anarchy"), 890 ("law unto itself") (1990).

¹²⁴ Cf. Fletcher, *supra* note 120, at 97.

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